

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: SOCIAL MEDIA ADOLESCENT
ADDICTION/PERSONAL INJURY
PRODUCTS LIABILITY LITIGATION

Case No. 22-md-03047-YGR (TSH)

[TENTATIVE] DISCOVERY ORDER

Re: Dkt. No. 271

The Court issues this tentative discovery order in advance of the May 22, 2023 hearing so that the parties may focus their arguments better at the hearing.

* * *

With respect to a protective order in this action, we are down to three disputes. ECF No. 271. The Court held a hearing on May 22, 2023 to discuss those disputes and now issues the following order.

A. Export Controls

Plaintiffs' proposed paragraph 12.8 states: "The Producing Party shall be responsible for identifying any technical data subject to laws or regulations that limit the export of technical data (including laws or regulations that limit the release of technical data to foreign persons or nationals in the United States or elsewhere). The Receiving Party shall take measures necessary to ensure compliance with any such export control laws or regulations. This provision does not apply to Protected Material designated 'HIGHLY CONFIDENTIAL (SOURCE CODE),' which shall be governed by a later order."

Defendants' proposed paragraph 12.8 states: "Except to the extent permitted by law and

1 necessary for a litigation need, no Protected Material designated ‘HIGHLY CONFIDENTIAL
2 (COMPETITOR)’ may leave the territorial boundaries of the United States of America, be viewed
3 outside the territorial limits of the United States of America, or be made available to any foreign
4 national who is not (i) lawfully admitted for permanent residence in the United States or (ii)
5 identified as a protected individual under the Immigration and Naturalization Act (8 U.S.C.
6 1324b(a)(3)). At the time of production, a Disclosing Party will identify to the Receiving Party
7 the Export Control Classification Numbers of the technical data contained in the Disclosing
8 Party’s ‘HIGHLY CONFIDENTIAL (COMPETITOR)’ productions to the best of its knowledge,
9 and the Receiving Party must ensure that it complies with all applicable export control regulations.
10 This provision does not apply to Protected Material designated ‘HIGHLY CONFIDENTIAL
11 (SOURCE CODE),’ which shall be governed by a later order.”

12 There are three sub-disputes here. One is whether Defendants must identify any technical
13 data on a document-by-document basis that is subject to laws or regulations that limit the export of
14 technical data. Defendants say this would be very burdensome because in their everyday business
15 they do not designate export control information at the document level. Defendants state that
16 requiring such designation at the document level for discovery purposes would require specialized
17 and expensive manual review by an export controls expert and an engineer able to translate
18 technical documents. Based on Defendants’ representation that they do not ordinarily designate
19 export control information at the document level, the Court will not require them to do so for
20 document production purposes and will instead allow Defendants to use a reasonable proxy for
21 documents that may be subject to export control.

22 The next sub-dispute is whether “Highly Confidential (Competitor)” Protected Material
23 (“HCC”) is a reasonable proxy for documents that may be subject to export control. The answer is
24 no. Both sides propose that HCC be defined as “Protected Material the disclosure of which to
25 another Party or Non-Party would create a substantial risk of serious harm that could not be
26 avoided by less restrictive means.” The focus of the HCC designation is therefore on
27 competitively sensitive business information, which is not the focus of export control regulations.
28 The Court is not going to impose export controls on, for example, emails that discuss confidential

business plans. The parties appear to agree that export control regulations apply only to technical data. The Court concludes that the protective order needs a new defined term: “Export Control Protected Material: Highly Confidential (Competitor) Protected Material of a technical nature that may be subject to export control regulations.” That term should then be used in Defendants’ paragraph 12.8 in place of HCC.

Third, the Court agrees with Plaintiffs that the words “and necessary for a litigation need” in Defendants’ paragraph 12.8 are unnecessary given the existing use restriction in paragraph 7.1.

Accordingly, the Court adopts Defendants’ proposed paragraph 12.8 as modified above.

B. Definition of Expert

As to the definition of an “expert,” Plaintiffs are moving backwards, which is dispiriting. When we were last here, “Plaintiffs object[ed] to Defendants’ proposed definition of ‘Expert’ to exclude any ‘past’ employee ‘of a Party or a Party’s competitor.’” ECF No. 192. Plaintiffs prevailed, and the Court struck the ban on past employees of a party or a party’s competitor. 4/10/2023 Tr. at 31. Plaintiffs now raise a new dispute, saying they want to be able to retain a current employee of a party’s competitor as an expert. Backsliding like this is the opposite of what the Court expects from meeting and conferring.

On the merits, the Court does not agree with Plaintiffs’ proposal. Discovery in this MDL proceeding is likely to involve highly confidential materials, and forcing a defendant to turn over its highly confidential materials to a current employee of a competitor is too much to demand. Plaintiffs argue that “Plaintiffs would be prevented from retaining a Microsoft coder who works on the Windows operating system, or an Amazon engineer who works on cloud data storage, even though such products have nothing to do with this case.” However, the Court is skeptical that current employees of Microsoft or Amazon, or other competitors of Defendants, moonlight as experts for Plaintiffs suing the tech industry. Experts typically work in firms, in academia, or by themselves. Plaintiffs have not persuaded the Court that excluding current employees of Defendants’ competitors inappropriately narrows the field of experts available to them.

C. Disclosure of Experts

Finally, Plaintiffs ask the Court to revisit its prior decision requiring expert disclosures

1 before a party may disclose protected material to an expert. The parties dispute what Judge Kuhl
2 said in a May 3, 2023 hearing in the JCCP proceeding.

3 The Court declines to change its mind. Defendants will be producing highly sensitive
4 documents in this MDL proceeding, and both sides agree that some of those materials will be
5 subject to export controls. Defendants are entitled to know who has their stuff. That can't be the
6 subject of mystery. While the Court rejected Defendants' proposed data security provisions at the
7 April 10, 2023 hearing, that was not out of the belief that there is no problem to be addressed.
8 Data breaches and ransomware attacks are on the rise. Forcing Defendants to produce extremely
9 sensitive materials, and then telling them "Don't worry who has your data – that's not for you to
10 know" is really just too much. Under Plaintiffs' proposal, Defendants would never, not even at
11 the conclusion of litigation, know all the expert firms that have or had their data because they
12 would never learn about the experts Plaintiffs later decided not to use. If a data breach happens
13 and some of Defendants' highly confidential materials end up in the public record, Defendants
14 need to know all the possible sources of the breach.

15 Further, the other purpose of the disclosure is to give the designating party the opportunity
16 to object if it believes its protected material should not be disclosed to a particular expert. Doing
17 away with the disclosure requirement would substantively abolish the opportunity to object. The
18 day expert reports are due is not when a designating party should learn for the first time that
19 someone who never should have had their protected materials has them.

20 **D. Next Step**

21 The Court **ORDERS** the parties to submit a proposed protective order in conformity with
22 this order within seven days.

23 **IT IS SO ORDERED.**

24
25 Dated: May 18, 2023

26 
27 THOMAS S. HIXSON
28 United States Magistrate Judge